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CITATIONS

722582—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 640

BAILEY FARM DAIRY COMPANY, ET AL., PETITIONERS

v.

CLINTON P. ANDERSON, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 376–391) is reported in 157 F. 2d 87. The opinion of the District Court (R. 29–69) is reported in 61 F. Supp. 209.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 5, 1946 (R. 391–392). The petition for a writ of certiorari was filed on October 23, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

STATUTE AND ORDER INVOLVED

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. 601 *et seq.*), which reenacted, with amendments, the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31), as amended. The order involved is Federal Milk Order No. 3, regulating the handling of milk in the St. Louis, Missouri, marketing area, as amended and reissued by the Secretary of Agriculture on December 27, 1943, effective January 1, 1944 (8 F. R. 17451). The pertinent provisions of the Act and of the order are set forth in the appendix to the petition.

QUESTIONS PRESENTED

1. Whether Section 903.3 (e) of the order, which provides for the classification of producer milk, violates the statutory requirement in Section 8c (5) (A) of the Act that milk be classified in accordance with the form in which, or the purpose for which, it is used.

2. Whether Section 903.3 (e) of the order violates any other provision of the Act or deprives the petitioners of their property without due process of law.

STATEMENT

On January 1, 1944, the date when Federal Milk Order No. 3, as amended and reissued, became effective, the petitioners filed with the War Food Administrator, pursuant to Section 8c (15) (A),

of the Act, a petition requesting that the classification provision in Section 903.3 (e) of the order be set aside because it was not in accordance with law. A hearing on the petition was held on March 27 and 28, 1944; the presiding officer filed a report on June 8, 1944, recommending the dismissal of the petition; the petitioners filed exceptions to the presiding officer's report; and on August 11, 1944, the petitioners presented oral argument on the exceptions before the Assistant to the War Food Administrator. On September 27, 1944, the Assistant to the War Food Administrator stated his findings of fact and conclusions, denied the relief requested by the petitioners, and dismissed the petition. (R. 257–276.)

Petitioners, acting pursuant to Section 8c (15) (B) of the Act, filed their complaint in the district court on October 12, 1944, for review of the administrative ruling (R. 3–19). An answer was thereafter filed by respondents, in which it was averred that the administrative ruling was in accordance with law, and in which a counterclaim was made for the enforcement of the order (R. 20–25). A motion for summary judgment was filed by respondents on March 5, 1945 (R. 26–28). The district court, after hearing, filed an opinion sustaining the motion and entered judgment upholding the administrative ruling and requiring compliance with the provisions of the milk order (R. 29, 74–75). The Circuit Court

of Appeals for the Eighth Circuit affirmed (R. 375, 391–392).

Section 8c (1) and (2) of the Agricultural Marketing Agreement Act of 1937 authorizes the Secretary of Agriculture to issue marketing orders regulating the handling of specified commodities, including milk and milk products. The Act sets forth the purposes of milk orders, prescribes the manner in which they shall be issued, and outlines the terms they may contain. Section 8c (5) (A) and (B) (i) provides that milk orders may (1) provide for the classification of milk in accordance with the form in which, or the purpose for which, it is used, (2) establish a *minimum class price,* uniform as to all handlers, for each use classification of milk, and (3) require payment by each handler to producers of a *minimum producer-price,* uniform as to all producers delivering milk to the same handler (in the case of individual-handler type pools), computed upon the weighted average value of milk received by the handler at the minimum class-prices established therefor.

The principal regulatory provisions of Federal Milk Order No. 3, as amended, are those made pursuant to Section 8c (5) (A) and (B) (i) of the act. The order provides for the classification of all milk received by each handler according to its use (Section 903.3). Generally speaking, Class I includes milk used as fluid milk and Class

II includes milk used in some other form. The order fixes a *minimum class-price* for each class of milk (Section 903.4) and establishes a *minimum producer-price* to be paid by each handler to all his producers (Sections 903.7, 903.8). The class-prices are uniform for all handlers in the marketing area, and the producer-price is uniform for all producers delivering milk to the same handler. Mathematically, the uniform price to be paid by each handler to his producers is a blended price computed by multiplying the quantity of producers' milk in each use class by the minimum class-price applicable thereto, and by dividing the product by the total quantity of producers' milk received by the handler.

The minimum class-prices and the minimum producer-prices apply only to milk received from producers, as that term is defined in the order. Normally, producers are located in or near the local marketing area. However, some handlers in the St. Louis marketing area receive milk not only from producers but also from other persons who are not producers, principally from handlers in the Chicago area. The former milk is referred to as "producer milk" and the latter milk is referred to as "outside milk." Both the producer milk and the outside milk are in practice commingled by the handlers, and it is not possible to determine the specific uses made of each kind. Regardless of commingling, however, the order

provides for the classification in Class I or Class II of all milk received by a handler, i. e., both producer milk and outside milk, and then for the allocation of the milk in each class either to producer milk or to outside milk, or to both (Sec. 903.3 (e)). The issue in this case involves solely the validity of this allocation provision of the order.

With respect to a handler of both producer milk and outside milk, Section 903.3 (e) of the order provides, in effect, that the total quantity of milk classified according to use in Class I shall be allocated first to producer milk, and the balance, if any, to outside milk, subject to a 5% tolerance allowance. Specifically, where the total quantity of a handler's Class I milk is less than 95% of his total quantity of producer milk, all the Class I milk is regarded as producer milk. Where the total quantity of Class I milk is equal to or more than 95% of the total quantity of producer milk, a portion of the Class I milk that is not less than 95% of the producer milk is regarded as producer milk. In either event, the balance of the producer milk falls in Class II.

ARGUMENT

I

Section 8c (5) of the Act provides that milk orders shall classify milk "in accordance with the form in which or the purpose for which it is used." Petitioners contend that the allocation

provision of the St. Louis milk order provides for classifying milk according to its source and thus violates the statutory direction.

The order provides that all milk received by a handler shall be classified in Class I or Class II according to its use (Sec. 903.3). It follows that all of the handler's milk is classified according to use. But since only part of the milk classified—the producer milk as distinguished from the outside milk—is subject to the pricing provisions of the order, it is necessary to determine what portion of the total quantity of milk in each use classification will be regarded as producer milk. Some system of allocation is necessary. The question presented in this case, therefore, is not whether the milk is classified according to use, which it indisputably is, but whether the method for allocating the producer milk as between the two classes is reasonable.

The reasonableness of the basis of allocation adopted in the order is to be appraised in the light of the purposes of the Act. The Act declares (Sec. 8c (18)) that the minimum prices fixed in any milk order for payment by handlers to producers shall give milk a purchasing power equivalent to its purchasing power during the "base period", and under certain conditions the prices to be established shall be such as to insure an adequate supply of wholesome milk in the marketing area. We submit that the allocation pro-

vision of the St. Louis milk order, examined in the light of these objectives, is clearly reasonable.

A marketing area is largely dependent upon local producers for an adequate supply of fluid milk, and outside milk is normally marketed in fluid form only during periods when there is a shortage of locally produced milk. Consequently, if a handler of both producer milk and outside milk were allowed to apportion his sales of fluid milk in such manner as to place a substantial part of the milk received from local producers in Class II, with consequent lower payments to local producers, their purchasing power and the stability of the local milk supply for the area would be impaired. The allocation provision of the order, by assigning 95% of producer milk to Class I (provided such 95% does not exceed the total milk coming within this classification) is designed to prevent outside milk from displacing locally produced milk available for use in fluid form. The provision thus has the effect of stabilizing both the price and supply of locally produced milk.

Petitioners contend (Pet. 16–17) that the principle of proration is embedded in the Act and that proration is the only permissible method for allocating Class I milk between producer milk and outside milk. They suggest that the provisions of the Act for an individual handler pool, those for a market-wide handler pool, and those for

blending the proceeds of cooperative associations of producers, each applies the principle of proration. But these provisions deal with prorating the total value of milk or its proceeds and have nothing to do with proration of commingled milk. The producers, in the case of an individual handler pool, receive a uniform price from their handler which is based not upon the use value of the milk of any particular producer but upon the blended uses of the milk of all the handler's producers. In a market-wide pool, all the producers for the market receive a uniform price based not upon the use made of the milk of any producer by the individual handler to whom it is delivered but upon the blended uses of all handlers. In the case of a cooperative association of producers, the proceeds of its milk represents money received under varying conditions from different distributors, some of whom may be and others may not be subject to a federal milk order.

The St. Louis milk order, prior to the 1944 amendment, allocated producer milk to Class I by applying to the total amount of the handler's Class I milk the percentage which his receipts of producer milk bore to his receipts of both producer and outside milk. This is an obviously reasonable method of allocation. But, to use the words of the court below, "it cannot be said that it is the only permissible method, where the Secretary of Agriculture has concluded that it [the proration method] does not sufficiently solve

the effect on producers' prices of a fluid use of outside milk and where that conclusion cannot be held to be without a rational basis as a matter of administrative judgment" (R. 385).

It should also be noted that the proration method of allocation and the method of allocation adopted in the present order have the same relation to the so-called "source" of the milk. Under both methods all the milk received by the handler is first classified according to its use and then the amount of milk in each classification is apportioned between producer milk and outside milk. One method of allocation is no more a classification according to source than is the other.

Moreover, the principle involved in the allocation provision of the present order has been ratified by Congress. The Agricultural Marketing Agreement Act of 1937 reenacted with amendments the marketing provisions of the Agricultural Adjustment Act of 1933, as amended. There were outstanding at the time of this amendment several milk orders containing provisions indistinguishable in principle from the present formula, and Congress declared that all outstanding orders "are hereby expressly ratified."[1]

[1] Agricultural Marketing Agreement Act of 1937, Sec. 4, 7 U. S. C. 672. In the orders ratified by Congress the "producer milk" consisted of milk acquired from producers other than the handler himself and the "outside milk" consisted of the handler's own production. All the handler's milk was classified according to use and the class utilization was then allocated to "producer milk" by excluding not exceeding 95%

II

Petitioners contend (Pet. 20–21) that the allocation provision of the order violates the requirement of Section 8c (5) (A) of the Act that the minimum price for each use classification which handlers shall pay shall be uniform as to all handlers. This contention confuses minimum class-prices with minimum producer-prices. Minimum prices for Class I and for Class II milk are determined in accordance with the provisions of Section 903.4 of the order and are the same for all handlers. These class prices are not, however, the prices which handlers pay to producers. The class prices, which might more appropriately be termed use values, are applied to the total quantity of milk within each class received by the handler from his producers and the sum thus arrived at, after being divided by the total quantity of producer milk received by the handler, gives the uniform producer-price which the handler pays to his producers. The quantity of producer milk allocated to Class I or to Class II affects the prices which individual handlers pay to producers but has no bearing on the minimum class-prices, which remain the same regardless of the allocation. It should be remem-

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of the outside milk from Class I utilization (Fall River, Mass., Order No. 5, Art. VI, § 1, 1 F. R. 202) or from Class I and Class II utilization (Kansas City, Mo., Order No. 13, Art. VI, § 2, 1 F. R. 1724) and the balance from lower class utilization. See R. 386–387.

bered that under an order with an individual handler pool, although the class prices applied by each handler are the same, the uniform minimum prices payable by the several handlers to their producers necessarily vary.

The allocation provision of the order does not, as contended by petitioners (Pet. 22–23), direct handlers to use producer milk for Class I purposes before using outside milk for such purposes. Although under this provision 95% of producer milk is allocated to Class I (provided it does not exceed the quantity of milk actually used for Class I purposes), handlers are free to use all or any part of their outside milk as fluid milk.

There is also no basis for the petitioners' contention (Pet. 25–27) that the allocation provision of the order violates Section 8c (5) (G) of the Act, which provides:

> No * * * order applicable to milk * * * in any marketing area shall prohibit * * * the marketing in that area of any milk * * * produced in any production area in the United States.

The St. Louis milk order does not prohibit or even regulate the acquisition, use or disposition of outside milk. The order does not regulate either the purchase price or the sales price of any outside milk which petitioners buy and then resell in the St. Louis marketing area. Under the order, petitioners are free to buy as much or as

little of such milk as they may wish. Petitioners' real complaint is that the prices which they are required to pay for producer milk allegedly make it unprofitable for them to purchase outside milk. That effect, if true, is purely collateral and is the result of economic factors, such as supply and demand, because the price of outside milk is determined solely by negotiation between the buyer and the seller. The Act contemplates (Sec. 8c (11) (A), (C)) that milk orders will be regional in application and that their terms will give due recognition to differences between areas in the production and marketing of milk. Minimum producer prices which are fixed by the Secretary in any regional order for the purpose of stabilizing the regional market and insuring an adequate supply of milk from local producers are not to be condemned merely because these prices make it less profitable, or unprofitable, for handlers subject to the order to purchase outside milk.

Petitioners further contend (Pet. 27–28) that the allocation provision of the order discriminates against them so grossly as to constitute a violation of due process requirements. Since the order treats all handlers exactly alike, the question raised is the alleged unfair and arbitrary nature of the order. As to this, we have already pointed out (*supra,* pp. 7–10) that the order is reasonably related to achieving a valid legislative purpose—stabilization of prices for producer milk and assurance of an adequate milk supply within the marketing area.

III

Petitioners urge (Pet. 29–30) that this Court should review the decision below because of the likelihood that the same legal questions will be presented in litigation concerning certain other milk orders containing provisions like those which are contested in this case. We submit, however, that it is purely speculative whether or not there will be such litigation and the significant thing is that the questions upon which the court below ruled have not heretofore been presented to any circuit court of appeals and are not involved in any other pending litigation.

As to petitioners' assertion (Pet. 14) that the allocation provision of the order is designed to evade the policy of the Emergency Price Control Act of 1942, it should be noted that Section 3 (d) of that Act (50 U. S. C. App., Supp. V, 903 (d)) provides that nothing contained therein shall be construed to affect the provisions of the Agricultural Marketing Agreement Act of 1937 or to invalidate any present or future marketing order or any provision thereof issued under such Act.

CONCLUSION

The questions presented were correctly decided by the court below and there is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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